

**BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of Solano  
(County File No. ACP-SOL-10-14)

Docket. No. 181

**DECISION**

**Charlene and Eugene Tenbrink  
5340 Thissell Road  
Winters, California 95694**

Appellant/

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations (3 CCR) section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Solano CAC found that the appellant, Charlene and Eugene Tenbrink (the Tenbrinks), violated 3 CCR section 6412(a) by possessing and applying a restricted material without a valid restricted material permit. The commissioner imposed a total penalty of \$500 for the violation.

The Tenbrinks appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

**Standard of Review**

The Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

### **Appellant's Contentions**

The Tenbrinks contended that the hearing was biased and the outcome predetermined.

### **3 CCR section 6412(a)**

3 CCR section 6412(a) provides, "[e]xcept as provided in this section and Sections 6400, 6414 and 6416, restricted materials shall be possessed or used only under permit of the commissioner or under his direct supervision, or under permit of the director in any county in which there is no commissioner."<sup>1</sup>

### **Factual Background**

The record shows that on January 25, 2008, the Tenbrinks purchased Enzone, registration number 66330-69, bearing the signal word "Danger." The active ingredient in Enzone is sodium tetrathiocarbonate. Sodium tetrathiocarbonate became a restricted material by regulation, promulgated by the Office of Administrative Law, on January 25, 2008. The Department notified all counties that sodium tetrathiocarbonate became a restricted material on January 28, 2008. The Tenbrinks made two subsequent purchases of Enzone in February 19, 2008, and again October 21, 2008.

The Tenbrinks made an application of 250 gallons of Enzone on April 29, 2008. The Tenbrinks did not report the application on their Pesticide Use Report (PUR) to the CAC until April of 2009, a year after the application. The failure to report in a timely manner was a violation of 3 CCR section 6626, although they were not charged with the violation in this case.

### **Analysis**

Certain pesticides are designated restricted materials because they pose a particular risk to human health or the environment. The restricted material permit process allows the CAC to monitor and restrict use based on local conditions. Enzone is designated a restricted material due to the volatile organic compounds contained in the active ingredient, sodium tetrathiocarbonate, which contributes to air pollution. The Tenbrinks' sole defense to their failure to obtain a permit was their lack of knowledge that Enzone had been designated a restricted material. There is information in the record that the Tenbrinks applied Enzone in late April of 2008. The distributors of Enzone, John Taylor Fertilizer/Wilbur-Ellis Company, did not inform the Tenbrinks that Enzone was a restricted material.

The Tenbrinks made two purchases of Enzone prior to the application in question. One on the same day that it became a restricted material by regulation and a second approximately three weeks later. The Tenbrinks made an application of Enzone in April of 2008, but did not report that Enzone application on their PUR until April of 2009, over one year later. 3 CCR section 6626 provides in relevant part, "[The PUR] shall be submitted by the 10th day of the month following the month in which the work was performed." Hence, the Tenbrinks did not report their application of

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1. There is information in the record that the exceptions listed in 3 CCR section 6412(a) were not relevant to this matter.

Enzone to the CAC in a timely manner. But for this violation of the pesticide use reporting requirements, the commissioner would have alerted the Tenbrinks to the permit requirement as early as mid-2008.<sup>2</sup>

The evidence in the record is uncontroverted that the Tenbrinks possessed and applied a pesticide designated as a restricted material without a valid restricted material permit issued by the Solano CAC. There is no statutory/regulatory requirement for the CAC to notify growers when a pesticide is designated a restricted material. Furthermore, the Tenbrinks have an obligation to know applicable laws and regulations that govern their activities; hence, the Appellants violated 3 CCR section 6412(a).

#### Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

#### Disposition

The commissioner's decision is affirmed. The commissioner shall notify the Appellants how and when to pay the \$500 fine.

#### Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

#### **STATE OF CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION**

Dated: MAR 10 2011

By:   
Mary Ann Warner, Director

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2. According to invoices in the record, the Tenbrinks purchased and retained 422.57 gallons of Enzone in January and February of 2008. On April 2, 2008, the Tenbrinks returned 123.26 gallons to their distributor. After applying the 250 gallons in April 29, 2008, as shown on the untimely PUR made a year later, 49.31 gallons remained in the Tenbrinks' possession available for use, an amount that was supplemented by the additional purchase of 225.65 gallons in October of 2008. This record creates an inference that the Tenbrinks made an additional unreported application(s) of Enzone without a permit some time after October 2008, and before the untimely reporting in April 2009 that led to this action.